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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 643

BERT O. PETERSON, MIDWEST HOLDING COMPANY, A CORPORATION,

Petitioners,

vs.

HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; OSCAR L. CHAPMAN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF THE INTERIOR; FRED W. JOHNSON, INDIVIDUALLY AND AS COMMISSIONER OF THE GENERAL LAND OFFICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Supreme Court of the United States:

Your petitioners herein, Bert O. Peterson and Midwest Holding Company, a corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on July 2, 1945, affirming the judgment of the District Court of the United States for the District of Columbia entered August 14, 1944.

The Proceeding Below

On July 2, 1945, the United States Court of Appeals for the District of Columbia affirmed (R. 75) with a written opinion (R. 71-74), which is not yet reported, the judgment of the District Court of the United States for the District of Columbia in this action (R. 69), which granted the respondents' motion (R. 10) as defendants for a summary judgment upon the complaint (R. 1-9) of the petitioners as plaintiffs. Within time as regularly extended a petition for rehearing (R. 75-81) was served and filed, and thereafter, or on September 10, 1945, was denied (R. 82).

By successive applications (R. 82-83) the mandate of the Court of Appeals has been stayed to December 8, 1945 (R. 83).

Jurisdiction

The jurisdiction of the Supreme Court is invoked under Section 240(a), Judicial Code of the United States, as amended (Section 347(a), Title 28, United States Code, Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938), and within the time limited by Section 350, Title 28, United States Code (Act of February 13, 1925, c. 229, sec. 8(a), 43 Stat. 940).

Under these statutes this Court has jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia rendered on July 2, 1945 (R. 75), which first became final on September 10, 1945, upon the denial of the petition for rehearing (R. 82); that is, by writ of *certiorari*, for which application is made on or before December 10, 1945.

Questions Presented

The questions presented by this record are:

1. May a motion for summary judgment be granted where the pleadings show there is a genuine issue as to a material fact?

2. Is an operator on unproven lands leased by the United States to another for the development of oil and gas, who is in possession and expressly assumes the obligations of the lease under an agreement approved and of record in the General Land Office, a "lease owner" within the intent of Section 17 of the Mineral Leasing Act of 1920, as amended by the Act of August 21, 1935, Section 226, Title 30, United States Code, Section 17, 49 Stat. 674, to whom the Secretary of the Interior must give notice of cancellation by registered mail, etc., as a condition precedent to cancellation?

The Statute Involved

The statute directly involved in this controversy is Section 17 of the Act of February 25, 1920; chap. 85, sec. 17, 41 Stat. 443, as amended by the Act of August 21, 1935, 49 Stat. 674, sec. 17; Title 30, sec. 226, United States Code, which provides:

"* * *

"Any lease issued after August 21, 1935, under the provisions of this section, except those earned as a preference right as provided in section 223 of this title, shall be subject to cancellation by the Secretary of the Interior *after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease,* unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. *Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address,* and in case

such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be cancelled only in the manner provided in section 188 of this title." (Italics supplied)

Statement of Facts

The petitioners' complaint for a declaratory judgment (R. 1-9) prays the reinstatement of an oil and gas lease issued by the United States to Peterson, of date December 31, 1938, for a five year term upon certain lands in Wyoming (R. 52-67). Peterson had previously held an oil and gas prospecting permit, dated November 26, 1929, issued for these lands under the Mineral Leasing Act of February 25, 1920 (R. 2). (See 41 Stat. 437, Title 30, sec. 221, United States Code.)

On August 20, 1937, while his permit was in effect Peterson entered into an operating agreement with Midwest Holding Company for the development of this acreage (R. 28-34). About April 8, 1938, this operating agreement was filed in the General Land Office, and thereupon approved (R. 2).

Under this operating agreement Midwest took the actual possession of the demised premises, entered into the occupancy of these lands to explore for oil and gas, assumed the payment of all operating costs and specifically of all rentals and royalties due the United States, and generally undertook full performance of Peterson's lease on the part of the lessee. Peterson's sole remaining rights under his lease were (1) to receive a royalty paid from production, if any, and (2) to re-enter on the default of Midwest (R. 28-34).

On September 7, 1937, Midwest made a further agreement, styled "Assignment", with Sha-Wa Petroleum Corporation (R. 35-41), filed with and approved by the Department June 16, 1938 (R. 12), but thereafter on March 7, 1941, at the suit of Midwest, cancelled by judgment of the District Court of the State for Carbon County, Montana (R. 49-51).

On March 10, 1941, a certified copy of this judgment was filed and thereupon recorded in the General Land Office (R. 5).

Thereafter on June 12, 1941, the Register of the Land Office at Cheyenne, Wyoming, sent Peterson alone notice by registered mail of an existing delinquency in the payment of rental due, advising that the lease would be recommended for cancellation unless payment was made within thirty days (R. 3). Peterson immediately wrote one John Wight, his attorney-in-fact of record in the Department and the vice-president of Midwest, demanding payment of this rental by Midwest under its operating agreement (R. 3). It is disputed whether this letter or any word at all of the proposed cancellation of the lease was ever received by the Midwest, or anyone on its part (R. 3-4).

Conversely, it is admitted that no notice under Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 21, 1935 (41 Stat. 437; 49 Stat. 674, sec. 17; Title 30, sec. 226, United States Code), was given the Midwest or received by it (R. 4).

Nevertheless, on December 6, 1941, the Commissioner of the General Land Office wrote Peterson that his lease had been recommended for cancellation, etc. (R. 4); and on December 30, 1941, upon the predicate of the notice given Peterson alone cancellation in form of this lease followed (R. 4).

On January 26, 1943, the petitioners made formal application to the Department for the reinstatement of their lease (R. 5). The Commissioner of the General Land Office denied this application on October 23, 1943 (R. 5).

Upon appeal the Secretary of the Interior affirmed on April 3, 1944, and thereafter on May 23, 1944, denied a timely motion for rehearing (R. 5-6; 11-27).

On May 31, 1944, Peterson and Midwest filed their complaint in the district court below praying a declaratory judgment that the lease in controversy was valid for want of the statutory notice of cancellation given Midwest, and that the Secretary of the Interior be directed to reinstate this lease in his Department, etc. (R. 1-9; 8-9).

The respondents as defendants then moved, on July 1, 1944, for a summary judgment (a) because of the want of a genuine issue as to any material fact, and (b) because the complaint failed to state a cause of action (R. 10).

At the argument on the motion Walter G. Moyle, counsel for petitioners, clearly pointed out to the District Court that, *as alleged in the complaint* (R. 3-4), there was a genuine issue as to whether Midwest Holding Company had actual notice and, therefore, constructive notice under the statute; that if the Court considered this to be a material fact the motion for summary judgment must be denied; but if, on the other hand, the Court did not consider this to be a material fact, then the motion could be considered without reference to that issue. But notwithstanding this issue as to actual notice, the Court, on August 14, 1944, granted the motion, stating, in part, in a Memorandum opinion that day filed, that the motion was granted "Because there was no genuine issue as to any material fact;" and "Midwest had actual notice of the default of Peterson, and therefore, constructive notice, at least, under the statute" (R. 68). Final judgment on August 14, 1944 followed (R. 69).

At the argument on appeal, Ernest H. Oliver, counsel for appellants, likewise urged before the Appellate Court that there was a genuine issue as to whether Midwest had actual notice, and therefore constructive notice under the statute, on which no hearing had been afforded by the District Court; and also that the finding of the Secretary of the Interior in his decision of April 3, 1944 (R. 11-24, at R. 22) that Midwest Holding Company had actual notice of the impending cancellation of the Peterson lease, lacked evidence to support it. Nevertheless, the Court of Appeals affirmed the judgment of the District Court, stating, in part, in its Opinion:

> "Moreover it may properly be noted that the Secretary found that Midwest had received *actual* notice of the proposed cancellation from Peterson. (It is not argued that this finding lacks evidence to support it)" (R. 74).

The issue as to actual notice in Midwest was thereafter again brought to the attention of the Court of Appeals in appellants' Petition for Rehearing (R. 78-80) but the petition was denied (R. 82).

Specification of Errors to Be Urged

The United States Court of Appeals for the District of Columbia erred:

1. In failing to remand the case to the District Court for the submission of evidence as to whether Midwest Holding Company had actual notice, hence constructive notice under the statute, of the proposed cancellation of the lease.

2. In holding, with respect to the finding of the Secretary of the Interior as to actual notice in Midwest Holding Company of the proposed cancellation of the lease,

that "(It is not argued that this finding lacks evidence to support it)."

3. In holding and deciding that the petitioner, Midwest Holding Company, is not a "lease owner" within the intent of Section 17 of the Mineral Leasing Act of 1920, as amended by the Act of August 21, 1935 (49 Stat. 674, sec. 17; Title 30, sec. 226, United States Code), to which under the statute notice of cancellation must be given by registered mail to effect a valid, summary cancellation of the Peterson lease.

4. In failing to hold that the operating agreement between Peterson and Midwest Holding Company is an assignment.

5. In affirming the decision of the District Court.

Reasons for Granting the Writ

I

Both the District Court and the Court of Appeals considered whether Midwest Holding Company had actual notice of the proposed cancellation of the lease to be a material fact. That there is a genuine issue as to this fact and that this issue was brought to the attention of the lower courts at every opportunity, has hereinbefore been shown. Yet no opportunity has been afforded to present evidence on this question. Rule 56(c) of the Rules of Civil Procedure for the District Courts of the United States prohibits the rendition of a judgment on a motion for summary judgment when there exists a "genuine issue as to any material fact." *It follows that there has been a lack of due process of law in this case.*

II

So far as petitioners have been able to determine no Court, prior to the ruling in the instant case, has construed

what is meant by "lease owner" under the statute involved. However, the Department of the Interior admits and the Court of Appeals held that the term "lease owner" as used in the statute includes "assignees" (R. 73). The Court of Appeals, however, held in effect that the operating agreement here involved was not an assignment (R. 74). This is in conflict with the decision of the Supreme Court of Montana in *Herigstadt* v. *Hardrock Oil Co.*, 101 Mont. 22, 52 P. (2d) 171, decided in Nov. 1935. That case involved a government oil and gas prospecting permit and an operating agreement similar to the one here involved. That Court held that such an operating agreement is an assignment.

Furthermore, the words "lease owner" and "owner" have been consistently construed by the Courts to include one situated such as is Midwest Holding Company.

In *Robinson* v. *Jones*, 119 Kan. 609, 240 Pac. 957, there was drawn in question the impact of a Kansas statute imposing a tax upon oil and gas wells. Specifically, the statutory provision in issue read so far as material here (*Kans., Revised Statutes, 1923, 79-329, 330, 331*):

> "• • • Provided, that such portion of the valuation of the oil or gas wells as represents the lessor's interest, or royalty interest, therein shall be assessed to the owner thereof and the remaining portion or working interest therein shall be assessed to the *owner of the lease*, together with the other property assessed in connection therewith." (Italics supplied.)

In determining, under this statute, who were meant by the phrase "owner of the lease" the Supreme Court of Kansas held (240 Pac. 959):

> "• • • As indicated in the illustrative case, it is common for portions of these interests to be found in the hands of several persons. In the present case, one-half of the one-eighth royalty was assigned, and

each owner was assessed $12,000 on account of his one-sixteenth interest. The lessees Robinson and Shelley each retained a one-sixteenth part of the working interest. Their assignee retained a one thirty-second part, and his assignee, the operator, held eight-sixteenths. The remainder of the working interest was divided between half a dozen owners of overriding royalties. It is quite manifest that each one of the two owners of the lessor's royalty should be assessed according to his interest. The rule that words of singular number may be extended to several persons (R. S. 77-201) governs, and the words 'owner thereof,' become, in practical application of the statute, 'owners thereof.' The same is true of the working interest. The phrase 'owner of the lease,' was applied to that interest in the same sense that 'owner thereof' was applied to the lessor's interest. The phrase means owner of the working interest, and, under the rule adverted to, includes all who share in that interest. * * *"

To the same point, in varying situations, are these further decisions and texts:

Callender v. *Crossfield Oil Syndicate*, 84 Mont. 263, 275 Pac. 273 (owner of equity in oil lease covered by statute affecting "owner of any leasehold for oil and gas purposes");

Nalle v. *Eaves*, (Tex. Com. App.) 5 S. W. (2d) 500 (owner under special assessment, eminent domain and condemnation statutes embraces holders of every kind of lien, claim or equity in property involved);

Sorg v. *Crandall*, 223 Ill. 79, 84 N. E. 181 (under Illinois mechanic's lien statute an owner is anyone having an interest in the land in question);

Webber, etc., Co. v. *Erickson*, 216 Mass. 81, 102 N. E. 940 (notice to the owner of property affected requires notice to others than owner of the fee);

Dugan v. *Cedar County*, 87 Neb. 689, 128 N. W. 29 (owner of land taken for highway purposes applies to all persons having an interest);

Brigham City v. *Chase*, 30 Utah 410, 85 Pac. 436 (under eminent domain statutes an owner is anyone having any lawful interest in the property to be condemned);

Judd v. *Landin*, 211 Minn. 465, 1 N. W. (2d) 861 (sublessor is owner of real property within meaning of Minneapolis building code);

Graf v. *State*, 118 Neb. 485, 225 N.W. 466 (an owner includes anyone with an equitable right or interest in land);

Board of Commissioners v. *Northwestern Mutual Life Insurance Co.*, 114 Neb. 596, 209 N. W. 256 (real estate mortgagee is landowner under statute authorizing special assessments for drainage districts);

Woodstock, etc., Co. v. *Charleston, etc., Co.*, 84 S. C. 306, 66 S. E. 194 (landowner is any person with interest in property affected by condemnation);

Lozo v. *Sutherland*, 38 Mich. 168 (under homestead exemption statute owner includes anyone with a claim or interest in the property);

Texas, etc., Company v. *Smith*, 108 Tex. 265, 192 S. W. 533 (owner as used in statutes frequently denotes one holding in his own right but with less than absolute title);

State v. *Wheeler*, 23 Nev. 143, 44 Pac. 430;

Benjamin v. *Wilson*, 34 Minn. 517, 26 N. W. 725;

Baltimore & Ohio Rd. Co. v. *Walker*, 45 Ohio St. 577, 16 N. E. 475;

National Bond, etc., Co. v. *Anderson*, 99 Minn. 137, 108 N. W. 861;

50 C. J. 770-775, sec. 48, et seq.;

42 Am. Jur. 215, sec. 38.

III

In the western states there are literally hundreds of oil and gas leases given by the United States upon public lands which are now being explored by operators under agreements of a kind with that of the petitioner Midwest at bar. Of the demised premises the operator with the approval of the Department of the Interior, and to its knowledge, is in actual and exclusive possession.

Until an oil or gas well is actually brought in, in the vast majority of cases, these leases are not known to contain valuable deposits of either. They are, accordingly, subject to summary cancellation under the statute.

Yet to determine whether oil or gas in commercial quantities is to be found the operator, also to the knowledge of the Department, must expend large sums of money in exploration, and as at bar is commonly required by his contract to perform all the obligations of the lease on the part of the lessee. He is, in short, generally considered in the field and elsewhere the "owner" of the lease, subject only (1) to the payment by him to the lessee of a royalty if a well is brought in, and (2) to the lessee's right of re-entry for his default.

Therefore, it is of prime importance to these operators as a class under oil and gas leases presently outstanding and covering thousands of acres of public lands whether Section 17 of the Act of August 21, 1935, 49 Stat. 674, Title 30, sec. 226, United States Code, includes them as lease owners, to whom notice of cancellation prior to discovery must be sent by the Secretary of the Interior. Specifically, it is of the utmost importance in the discovery and development of oil and gas on the public lands that there be an authoritative interpretation of the controlling statute un-

der which the Secretary acts in thus summarily cancelling leases covering unproven lands. The rights of an operator or other person with a substantial interest in an existing oil and gas exploration under a lease with the United States should be neither obscure nor hereafter debatable.

Or as the Court of Appeals has put the issue (R. 73),

"The answer is not wholly without doubt, * * *"

Yet the opinion of the Court of Appeals at bar in construction of Section 17 of the Mineral Leasing Act of 1920, as amended by the Act of August 21, 1935, is *persuasive authority only* in the Circuit Courts of Appeal in the west where oil and gas lands in general lie and where the great volume of oil and gas litigation arises. That is, in these courts in the Fifth, Tenth and Ninth Circuits, for example, the instant opinion in the United States Court of Appeals for the District of Columbia is neither binding nor conclusive. There, in a proper case, the question here presented may again be raised and litigated to the unnecessary expense of the parties and to a conclusion the exact opposite of that reached by the courts of the District of Columbia, one of which has itself suggested the possibility of a different result and noted the existence of room for differing opinions.

Accordingly, it appears that the United States Court of Appeals for the District of Columbia has, in the premises, *decided a question of general importance and of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Court within the intent and meaning of its Rule 38(5c).* Otherwise, inevitable dispute and confusion will follow in the construction of the applicable statute at bar hereafter as heretofore.

Conclusion

WHEREFORE, your petitioners respectfully pray that this petition be granted.

Respectfully submitted,

BERT O. PETERSON,
MIDWEST HOLDING COMPANY,
Petitioners.

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December, 1945.

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OCTOBER TERM, 1945

No. 643

BERT O. PETERSON AND MIDWEST HOLDING COMPANY, PETITIONERS

v.

HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The district court's memorandum (R. 68) is not reported. The opinion of the Court of Appeals (R. 71–74) is reported in 151 F. 2d 301.

JURISDICTION

The judgment of the Court of Appeals was filed July 2, 1945 (R. 75). A petition for rehearing was denied on September 10, 1945 (R. 82), and the petition for a writ of certiorari was filed on December 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there existed a genuine issue as to the fact that petitioner Midwest Holding Company had actual notice of the proposed cancellation of the oil lease here involved, and if so, whether that fact was material so that summary judgment was improperly granted.

2. Whether petitioner Midwest Holding Company was a "lease owner" within the meaning of Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 21, 1935, 49 Stat. 674, 678, 30 U. S. C., sec. 226, to whom notice of proposed cancellation of an oil lease is required to be given under that section.

STATUTE INVOLVED

Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 21, 1935, 49 Stat. 674, 678, 30 U. S. C. sec. 226, so far as here material, reads as follows:

* * * * *

> Any lease issued after August 21, 1935 under the provisions of this section, except those earned as a preference right as provided in section 14 hereof, shall be subject to cancelation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancela-

tion shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of the Act.

STATEMENT

The judgment which petitioners ask this Court to review affirmed a summary judgment of the district court entered in favor of the respondents (R. 69, 75). Petitioners' complaint, while captioned as one for declaratory judgment (R. 1), prayed for an order directing respondents to reinstate an oil and gas lease formerly issued to and held by petitioner Peterson (R. 8).

In substance the complaint (R. 1–9) alleges these facts:

Peterson received from the General Land Office an oil and gas prospecting permit dated November 26, 1929, on certain lands in Wyoming, pursuant to the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 441). On or about August 20, 1937, he entered into an operating agreement with Midwest Holding Company which was subsequently

approved by the Department on April 8, 1938. This agreement gave Midwest the right to develop the permit lands for oil purposes and bound it to pay all costs of development, including rentals and costs of bonds and certain royalties to Peterson on the oil produced (R. 2). On or about September 7, 1937, Midwest entered into an agreement with Sha-Wa Petroleum Corporation whereby it transferred to the latter its right to develop the lands embraced in the Peterson permit.

Upon application of the operator pursuant to paragraph 4 of the operating agreement, the Peterson permit was exchanged for a lease under section 13 of the Mineral Leasing Act, as amended by the act of August 21, 1935 (49 Stat. 674, 30 U. S. C. sec. 221). The lease was issued to Peterson on December 31, 1938, for a term of 5 years with an annual rental of $110.25, beginning with the third year of the term. The rental for the third year was due and payable in advance on January 1, 1941, and was not paid. On June 12, 1941, the Land Office sent Peterson, who lived at Armstrong, Iowa, a notice by registered mail of the delinquency and informed him that the lease would be recommended for cancellation unless the rent was paid within 30 days. On July 14, 1941, Peterson's attorney answered by letter, stating that the rental on Peterson's lease should be paid by Midwest, requesting a reasonable length of time to adjust the matter, and promising that Peterson

would pay if Midwest failed to do so. Peterson wrote to John Wight, whom he had previously designated as his attorney in fact and who was also Vice President of Midwest, requesting that Midwest pay the 1941 rental. After alleging these facts, the complaint stated (R. 3–4):

> There is a dispute between the parties to this proceeding whether or not this letter was received by Midwest and whether, in fact, Midwest ever received actual notice of the proposed cancellation from any source. It is, however, an admitted fact that no notice in the form prescribed by the statute was ever given Midwest.

On December 6, 1941, the Land Office wrote to Peterson, informing him that the lease had been recommended for cancellation, but that he would still be required to pay the delinquent rental for 1941. Peterson again wrote to John Wight demanding that the rental be paid, but his letter was returned undelivered. On December 30, 1941, the Department cancelled the lease and notified Peterson of this action on January 13, 1942. The delinquent rental was subsequently paid (R. 4).

On February 11, 1942, Maude L. Brown filed an application for an oil and gas lease on the lands embraced in the Peterson lease. The Land Office wrote Mrs. Brown's counsel on November 6, 1942, that the register of the local land office at Cheyenne had been instructed to request her to pay the first year's rental in advance and that when she had

done so the lease forms would be sent to her for execution. Before Mrs. Brown executed a lease, Midwest telegraphed the Land Office protesting the cancellation of Peterson's lease and requesting that action on Mrs. Brown's application be deferred until it could file further showing. On January 26, 1943, Midwest and Peterson filed a formal application for reinstatement of Peterson's lease. On October 23, 1943, the Commissioner of the General Land Office denied the application; on April 3, 1944, the Secretary of the Interior affirmed the Commissioner's decision and on May 23, 1944, denied a motion for rehearing (R. 5–6).

The complaint further alleges the exhaustion of remedies in the Department and that the only remaining remedy is by application to a court for declaratory judgment (R. 8). The complaint prays that the decisions of the Commissioner and of the Department be vacated because in violation of the applicable statutory provisions, that the Secretary be required to reinstate the Peterson lease, and for such other and further relief as may be proper and just (R. 8–9).

Respondents filed a motion for summary judgment (R. 10) under Rule 56, F. R. C. P., on the grounds that there was no genuine issue as to any material fact and that the complaint failed to state a cause of action. Attached as exhibits to the motion were certified copies of official documents of the Department of the Interior consisting of the

decision of the Secretary of the Interior on petitioners' appeal from the decision of the Commissioner denying the application for reinstatement, the Secretary's decision denying a rehearing, the operating agreement showing the interest of petitioner Midwest Holding Company in the Peterson permit, the assignment by Midwest to Sha-Wa Petroleum Corporation of its rights under the operating agreement, and the application for lease based upon the Peterson permit (R. 11–48).

After hearing the district court entered judgment in favor of respondents (R. 69), and upon appeal the Court of Appeals entered judgment affirming the judgment of the district court (R. 75).[1] A petition for rehearing was denied on September 10, 1945 (R. 82). The petition for a writ of certiorari was filed on December 7, 1945.

ARGUMENT

1. No genuine issue as to a material fact was presented by the pleadings. If the Secretary, in the first instance, and the two courts below, have correctly held that petitioner Midwest Holding Company is not a "lease owner" entitled to notice of the proposed cancellation under section 17 of the Mineral Leasing Act, then the question of Mid-

[1] Through inadvertence the judgment of the court of appeals, as it appears at R. 75, fails to show that the judgment of the district court was affirmed. Respondents understand, however, that a certified copy of the original judgment, showing the affirmance, is on file with the Clerk of this Court.

west's having actual notice is obviously immaterial. Moreover, petitioners' claim that a real issue on that fact was raised by the pleadings is colorable rather than real. Their complaint (Par. 7, R. 3) admitted that Peterson's attorney mailed a letter to Midwest demanding that it pay the rental then long overdue. The date of this letter was "at or about July 14, 1941" (R. 21). The inference is that it was delivered. Petitioners' complaint contained no categorical denial that it was received by Midwest; a denial is only to be found by implication from the oblique averment that "there is a dispute between the parties * * * whether or not this letter was received by Midwest." In support of the motion for summary judgment respondents attached as Exhibit 1 the decision of the Secretary affirming the Commissioner's decision (R. 11–24). In this decision, the Secretary carefully considered this issue and the evidence thereon including post office records (R. 20–22). These evidentiary facts clearly support the Secretary's finding that Midwest had actual notice of the intent to cancel the lease. These facts were not challenged by petitioners by any response to the motion; their denial, if any there was, went only to the ultimate fact. Petitioners admit that in briefing the case before the Court of Appeals this point was not urged (R. 79), and their assertion (Pet. 7) that on oral argument before that court they insisted that an

issue existed does not in terms controvert the statement of the lower court that "It is not argued that this finding lacks evidence to support it" (R. 74). Even in the petition for writ of certiorari, no contention is made that the administrative finding upon the fact lacked evidence to support it. Under these circumstances both courts below correctly held that there was no genuine issue as to a material fact raised by the pleadings.

2. Petitioner Midwest Holding Company was not a "lease owner" within the meaning of section 17. The only reasonable meaning of the term "lease owner" is that it means the title holder of the lease, which in turn means the lessee or any person to whom title has passed by assignment or operation of law. That was the construction of the Secretary in deciding this case (R. 15–16). Peterson held the record title to the lease and was therefore the lease owner unless the operating agreement constituted an assignment of the lease.

Petitioners fail to establish that the Secretary and the courts below erred in determining that Midwest, as the holder of the operating agreement, was not a "lease owner." They appear first to argue that, regardless of whether the operating agreement constituted an assignment, Midwest nevertheless had such an interest in the lease as constituted it a lease owner. The authorities cited by them (Pet. 9–11) do not deal with the question here presented under section 17 of

the Mineral Leasing Act; they establish only that, for special purposes unrelated to the matter now in hand, in such diverse fields as condemnation, mechanics' liens, taxation, etc., an "owner" may be one having less than full legal title to property. The problem here is unlike any of those dealt with in the cases cited. Manifestly, it would seriously complicate the administrative function under the statute if the Secretary must weigh all possible interests created by lessees under contracts with third parties for the purpose of giving notice (cf. R. 74). Under this theory multiple notices would have to be given in many cases, but the statute clearly does not contemplate this.

Moreover, it is clear that the Secretary and the courts below correctly decided that the operating agreement here involved was not an assignment. As the court below said (R. 73), "it is certainly not technically an assignment." And a fair analysis of the agreement shows that the parties themselves did not regard it as an assignment. By paragraph 4 of the agreement (R. 29) Peterson was to file any application for extension of the permit or for leases and take such action before the Department as Midwest (designated in the agreement as "Contractor" and not as "Assignee") should request. In paragraph 9 Peterson reserved the right to cancel the agreement, and by paragraph 10 he had the right to examine and inspect operations by Midwest (R. 32–33). Most

significant of all, and a clear showing that the agreement was not an assignment of either the permit or the lease that was later issued and was not regarded as such by petitioners, is the fact that by paragraph 5 (R. 30) Peterson agreed to assign to Midwest at the latter's request any future leases obtained by Peterson. The lease in question was issued to Peterson (R. 3) but no assignment was requested and none was made. These provisions fully justify the view of the Secretary and the lower courts that Midwest was not an assignee of either the permit or the lease. It is submitted, moreover, that the Secretary's determination that the operating agreement was not an assignment is of a type which should not in any event be disturbed by the courts. *Choate* v. *Commissioner,* 324 U. S. 1.

Furthermore, while petitioners' complaint purports to be one for a declaratory judgment, it actually seeks coercive relief (R. 9). And where, as here, it is sought by judicial proceedings to compel an administrative officer to apply a given construction to a statute, the courts will consider only whether the construction adopted by the officer is clearly wrong; if it is not, the administrative determination will be sustained. *Hall* v. *Payne,* 254 U. S. 343, 347–348; *Wilbur* v. *United States,* 281 U. S. 206, 219.

Finally petitioners' effort (Pet. 12–13) to establish that the question presented is of sufficient im-

portance to justify review by this Court is answered by the record. The statute under consideration has been in operation for ten years, and the Department, using the same test applied here, during the first eight years of the statute's operation cancelled "several thousand * * * leases" (R. 17); yet petitioners admit (Pet. 8–9) that this is the first time anyone claiming to be an owner of a cancelled lease has challenged the Secretary's interpretation of the statute by judicial proceedings.

CONCLUSION

The decision below is correct and involves neither a conflict of decision nor a question of general importance. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 643

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

BERT O. PETERSON AND MIDWEST HOLDING COMPANY, A CORPORATION,

Petitioners,

vs.

HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; OSCAR L. CHAPMAN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF THE INTERIOR; AND FRED W. JOHNSON, INDIVIDUALLY AND AS COMMISSIONER OF THE GENERAL LAND OFFICE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONERS

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Opinion Below

The district court's memorandum (R. 68) is not reported. The opinion of the Court of Appeals (R. 71-74) is reported in 151 F. (2d) 301.

Jurisdiction

The judgment of the Court of Appeals was filed July 2, 1945 (R. 75). A petition for rehearing was denied on September 10, 1945 (R. 82), and the petition for a writ of certiorari was filed on December 7, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Statute Involved

The statute directly involved in this controversy is Section 17 of the Act of February 25, 1920; Chap. 85, Sec. 17, 41 Stat. 443, as amended by the Act of August 21, 1935, 49 Stat. 674, Sec. 17; Title 30, Sec. 226, United States Code, which provides:

> "• • •
>
> "Any lease issued after August 21, 1935, under the provisions of this section, except those earned as a preference right as provided in section 223 of this title, shall be subject to cancellation by the Secretary of the Interior *after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease,* unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. *Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record postoffice address,* and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be cancelled only in the manner provided in section 188 of this title." (Italics supplied.)

Statement

The purpose of this reply brief is to correct certain incorrect inferences, statements of fact and legal conclusions contained in respondents' brief. They are discussed immediately following.

Argument

In their brief (p. 8) respondents infer that post office records showing delivery of the Peterson July 14, 1941, letter to Midwest was evidence before the Department. This is incorrect. While the decision of the Secretary affirming the Commissioner's decision states that the records of the Postmaster at Billings, Montana, show the receipt of a letter from Bert O. Peterson to Midwest Holding Company on July 28, 1941, and the delivery of this letter to E. A. Wight, on August 1, 1941 (R. 22), *these records form no part of the record before the Department* (R. 79). Furthermore the Secretary's assumption that it was the same letter as that written by Peterson to *John Wight* on July 14, 1941, is erroneous because it cannot be properly assumed that that letter took fourteen days to reach Billings, Montana, from Armstrong, Iowa, and also because the Peterson letter of July 14, 1941, advising of the proposed cancellation was addressed to John Wight and not to Midwest Holding Company or E. A. Wight, to whom the Secretary of the Interior says delivery was made (R. 79-80).

Respondents state in their brief (pp. 8-9) that the petition herein does not in terms controvert the statement of the lower court with respect to the administrative finding of actual notice in Midwest, that "It is not argued that this finding lacks evidence to support it." This is not correct. It is specifically stated in the petition (P. 7) that counsel for Petitioner argued before the lower court

that this finding of the Secretary "lacked evidence to support it."

At Page 11 of their brief respondents state:

> "* * * It is submitted, moreover, that the Secretary's determination that the operating agreement was not an assignment is of a type which should not in any event be disturbed by the courts. *Choate* v. *Commissioner*, 324 U. S. 1.
>
> Furthermore, while petitioners' complaint purports to be one for a declaratory judgment, it actually seeks coercive relief (R. 9). And where, as here, it is sought by judicial proceedings to compel an administrative officer to apply a given construction to a statute, the courts will consider only whether the construction adopted by the officer is clearly wrong; if it is not, the administrative determination will be sustained. *Hall* v. *Payne*, 254 U. S. 343, 347-348; *Wilbur* v. *United States*, 281 U. S. 206, 219."

Petitioners do not believe that these are proper questions to be raised at this stage of the proceedings but should be considered when the case is before this Court on its merits after the writ is granted. However, since respondents have raised these questions, it is pointed out that the *Choate* case is not in point. It holds that a determination of the Tax Court that the parties intended a cash sale of equipment is not open for redetermination by this Court, but is the kind of an issue reserved for the Tax Court. It has nothing to do with a determination of the Secretary of the Interior as to who is a "lease owner" under the Mineral Leasing Act.

The requirement of the Mineral Leasing Act calls for the performance of a ministerial act on the part of the Secretary of the Interior of a character long recognized as reviewable by the courts. *Wilbur, Secretary of the Interior*, v. *United States ex rel. Krushnic*, 280 U. S. 306.

In that case, as at bar, the interpretation and application of the *Mineral Leasing Act* of February 20, 1920, was drawn in question. Paralleling the controversy at bar there the Secretary of the Interior had applied the terms of that statute in such a way as to hold invalid and void the placer mining claim of the relator Krushnic.

The question common to both that case and the one at bar is whether the Secretary applied to the facts before him the plain language of the controlling statute. In that case this Court directed the issuance of a writ of mandate upon this ground (280 U. S. 319):

> "In this case, the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and, in so doing, departed from a plain official duty."

Reliance was had in reaching this conclusion upon the earlier language of the court in *Roberts* v. *United States*, 176 U. S. 221, 20 Sup. Ct. Rep. 376, 44 L. Ed. 443, which we quote here as the rule in point (176 U. S. 231):

> "* * * Every statute to some extent required construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might suc-

cessfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

See to the same point

Ballinger v. *United States ex rel. Frost*, 216 U. S. 240;
Lane v. *Hoglund*, 244 U. S. 174;
Work v. *United States ex rel. Lynn*, 266 U. S. 161;
Work, Secretary of the Interior, v. *United States ex rel. McAlester-Edwards Coal Company*, 262 U. S. 200;
Work, Secretary of the Interior, v. *United States ex rel. Mosier*, 261 U. S. 352;
Garfield, Secretary of the Interior, v. *United States ex rel. Goldsby*, 211 U. S. 249.

It is manifest that at bar the discretion of the Secretary of the Interior, exercised as he sees the public interest, to cancel out the Peterson lease is in nowise to be controlled or restrained. But after that discretion is exercised, the court is to declare whether the Secretary has followed the statute in effecting the cancellation. Such is, indeed, the very function of the judiciary itself, which in nowise infringes upon the prerogatives of the executive.

Conclusion

The necessary conclusion to be drawn from the admitted facts at bar is that the Secretary of the Interior did not follow the plain command of *Section* 17 of the *Mineral*

Leasing Act, as amended, in attempting a cancellation of the Peterson lease. Absent notice by registered mail to the appellant company as a "lease owner" within the sweep of this statute, there has been no cancellation certainly as to it.

Accordingly, the Secretary and the Department are under the plain, legal duty to recognize the lease in issue as valid; that is, certainly as to Midwest and its rights under its operating agreement and until compliance be had with the statute.

The petition should be granted.

Respectfully submitted,

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